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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MITSUI & CO., LTD., *et al.*,
Petitioners,

v.

INDUSTRIAL INVESTMENT
DEVELOPMENT CORPORATION, *et al.*,
Respondents.

PETITION FOR FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a foreign commercial dispute that has no significant anticompetitive effect upon United States commerce is within the jurisdictional scope of the Sherman Act.

2. Whether a plaintiff who alleges only injury from competition, and does not allege injury of a kind that the antitrust laws were intended to prevent, has standing to sue for treble damages under the Clayton Act.*

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* The parties in the court of appeals were petitioners Mitsui & Co., Ltd., and Mitsui & Co. (U.S.A.), Inc., and respondents Industrial Investment Development Corporation, Indonesia Industrial Investment Corporation, Ltd., and Forest Products Corporation, Ltd.

Mitsui & Co. (U.S.A), Inc., is a subsidiary of Mitsui & Co., Ltd. The other subsidiaries and affiliates of Mitsui & Co., Ltd., are listed in Appendix G, *infra*.

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INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, *et al.*,

Respondents.

PETITION FOR FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mitsui & Co., Ltd., and Mitsui & Co. (U.S.A.), Inc., hereby petition for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 671 F.2d 876. The opinion of the district court (App. B, *infra*) is not officially reported. [1]

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[1] An earlier opinion of the district court (App. C., *infra*) dismissing the complaint under the act of state doctrine is reported at 1978-1 Trade Cas. ¶ 62,130. The opinion of the court of appeals (App. D, *infra*) reversing that order of dismissal is reported at 594 F.2d 48. This Court's order denying the petition for a writ of certiorari to review that decision is reported at 445 U.S. 903.

JURISDICTION

The judgment of the court of appeals (App. E, *infra*) was entered on March 31, 1982. The court's order denying rehearing (App. F, *infra*) was entered on May 5, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, as amended, 15 U.S.C. §§ 1 and 2, in pertinent part provide:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .
>
> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

Section 4 of the Clayton Act, as amended, 15 U.S.C. § 15, in pertinent part provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

STATEMENT

This case arises out of competition between petitioner Mitsui & Co., Ltd. ("Mitsui"), and Forest Products Corporation ("Forest Products"), the predecessor in in-

terest of respondent Industrial Investment Development Corporation ("Industrial Investment"), for the right to purchase the logs harvested by an Indonesian corporation, P. T. Telaga Mas Kalimantan Co. ("Telaga Mas"), from a particular tract of forest on the Island of Kalimantan (Borneo) in Indonesia. The forest tract of some 100,000 hectares was controlled by Telaga Mas under a concession granted to it by the Indonesian government. Forest Products attempted to form a joint venture with Telaga Mas to exploit the concession. After considerable internal debate and prolonged legal skirmishing in Indonesia between rival groups of its shareholders, Telaga Mas determined not to proceed with the joint venture. Instead, Telaga Mas obtained financing from Mitsui to develop the concession by contracting to sell its log production exclusively to Mitsui's American subsidiary, Mitsui & Co. (U.S.A.), Inc. The logs so obtained were imported into Japan.

Disappointed with the result of its efforts in Indonesia, Industrial Investment and two other related corporations brought this action in the United States District Court for the Southern District of Texas, asking for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, on the ground that, by inducing Telaga Mas to deal with it rather than with Forest Products, Mitsui had violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.[2] Mitsui moved to dismiss the action on four separate grounds: that adjudication was barred by the act of state doctrine; that the dispute between the parties was beyond the

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[2] To support its claim under the Sherman Act, Industrial Investment alleged a conspiracy between Mitsui, its American subsidiary, and Telaga Mas. In the alternative, Industrial Investment alleged conversion and tortious interference with Forest Products' contractual rights.

reach of American antitrust laws; that Industrial Investment lacked standing to sue for treble damages under the Clayton Act because the injury it had alleged was not of the kind that the antitrust laws were intended to prevent; and that under the doctrine of *forum non conveniens* the case should not be tried in the courts of the United States. Thus, the burden of Mitsui's motion was that an essentially local Indonesian dispute, involving competition between potential buyers from a single logging concession in that country, did not present an issue appropriately justiciable under American antitrust laws or in an American court.

The district court initially dismissed the action on the ground that adjudication of the dispute was barred by the act of state doctrine. App. C, *infra*. The court of appeals reversed, App. D, *infra*, and this Court denied certiorari, 445 U.S. 903 (1980). On remand, the district court entered a second order of dismissal, on the grounds of extraterritoriality, lack of standing, and *forum non conveniens*. App. B, *infra*. Once again, the court of appeals reversed. App. A, *infra*.

In considering the issue of extraterritoriality, the court of appeals began with the premise that any alleged restraint of trade, anywhere in the world, that "affects the flow of commerce into or out of the United States is within the scope of the Sherman Act." App. A, *infra*, p. 6a. Merely on the basis of its assumption that Industrial Investment's inability to purchase logs from Telaga Mas could have affected the total quantity of lumber imported into the United States, without considering whether such an effect upon United States commerce was either significant or anticompetitive, the court held that the dispute between Industrial Investment and Mitsui was within the reach of American antitrust laws.

With respect to the question of standing, Mitsui had argued that under this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), a plaintiff, in order to be permitted to go to trial, must allege injury of a kind that the antitrust laws were intended to prevent. The court of appeals rejected this reading of *Brunswick*. The court stated that "*Brunswick* is not a standing case," App. A, *infra*, p. 17a, and expressed the view that "[i]t is analytically unsound . . . to consider the requirement of antitrust injury an additional component of the standing inquiry," *id.* at 18a. The court acknowledged that, following *Brunswick*, "two other circuits have held that antitrust injury is a component of standing. *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1234 (6th Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 388, 70 L.Ed.2d 207 (1981); *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 498-500 (9th Cir. 1977)." *Id.* at 20a n.15. But the court explicitly "disagree[d] with their analysis," *id.*, and held that Industrial Investment, in order to proceed to trial, need not allege an injury of the type that the antitrust laws are intended to prevent.[3]

REASONS FOR ALLOWING THE WRIT

The Fifth Circuit's holding on the issue of extraterritoriality—that an alleged foreign restraint of trade may be within reach of the Sherman Act without regard to whether its effect upon United States com-

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[3] The court of appeals further held that this Court's decision in *United States* v. *National City Lines, Inc.*, 334 U.S. 573 (1948), foreclosed recourse to the doctrine of *forum non conveniens* in every antitrust case and was not limited to cases in which the alternative venue lies in a court of the United States.

merce is either significant or anticompetitive—conflicts with *National Bank of Canada* v. *Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981). The Fifth Circuit's holding on the issue of standing—that an antitrust plaintiff may have standing to sue, despite the fact that the specific injury alleged is not of the kind the antitrust laws were intended to prevent—conflicts with this Court's decisions in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Blue Shield of Virginia* v. *McCready*, 50 U.S.L.W. 4723 (June 21, 1982), and with *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert. denied*, 102 S.Ct. 388 (1981), and *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977). Both issues are important to the administration of the antitrust laws.

1. In the view of the court of appeals, an alleged foreign restraint of trade is within the scope of the Sherman Act so long as it "affects the flow of commerce into or out of the United States . . . ." App. A, *infra*, p. 6a. The court reasoned accordingly that the Sherman Act extends to the transactions at issue in this case merely because logs originating in Indonesia and thereby potentially available to the United States market had been imported instead into Japan. The jurisdictional standard thus applied is far too loose. While it could, perhaps, be said that the importation of logs into Japan "affects" commerce of the United States in some attenuated sense, *e.g.*, in the same sense that a farmer's consumption of home-grown wheat was said to "affect" *interstate* commerce in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), Congress cannot be understood as having intended to extend the reach of American antitrust laws into foreign territories on the basis of such insubstantial connections with American commerce. *See generally, e.g.*, Rahl, *American Antitrust and Foreign Operations: What Is Covered?*, 8 Cornell Int'l L.J. 1 (1974). Applying the reasoning of the court of

appeals, a right to bring an action for treble damages in courts of the United States could arise from practically any international competition anywhere in the world.

In holding that an Indonesian logger's substitution of one exclusive buyer for another is within the reach of American antitrust laws, merely because the disappointed buyer has alleged that it might have imported some of the logs into the United States, the Fifth Circuit has gone far toward converting the Sherman Act into a worldwide charter for bringing foreign business disputes before American courts. If this local Indonesian matter implicates American antitrust law, almost any foreign commercial dispute can be made justiciable in the United States with the aid of cleverly drafted pleadings. "The flow of litigation into the United States would increase and further congest already crowded courts." *Piper Aircraft Co.* v. *Reyno*, 102 S.Ct. 252, 264 (1981). The American judicial system is ill-equipped to act as the international arbiter of international commerce, and Congress has not thrust that role upon it.

The Fifth Circuit in this case erred in failing to require at least a plausible allegation of a significant *anticompetitive* effect upon United States commerce before asserting jurisdiction. Its decision conflicts with that of the Second Circuit in *National Bank of Canada*. In that case, the Second Circuit drew upon this Court's decision in *Brunswick* and upon Judge Learned Hand's opinion in *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945), to define with care the proper jurisdictional limits of American antitrust laws:

> [T]he inquiry should be directed primarily toward whether the challenged restraint has, or is intended

> to have, any anticompetitive effect upon United States commerce. . . .
>
> Our jurisdiction is not supported by every conceivable repercussion of the action objected to on United States commerce. Only those injuries to United States commerce which reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation constitute effects sufficient to confer jurisdiction. . . . [T]here must be at least *some* anticompetitive effects to meet the threshold requirement of jurisdiction.

National Bank of Canada v. *Interbank Card Ass'n*, 666 F.2d at 8 (emphasis in original).

If the Fifth Circuit had applied the standard articulated by the Second Circuit, it would have concluded that this Indonesian dispute was not within the reach of the Sherman Act. In *National Bank of Canada*, the exclusion of a firm from the entire Canadian national market did not pose "a foreseeable threat to United States commerce of a type sufficient to justify assertion of jurisdiction." *Id.* at 9. *A fortiori*, exclusion of Industrial Investment from a single Indonesian logging concession does not entail the kind of anticompetitive effect upon United States commerce that would warrant the exercise of jurisdiction by an American court.[4]

The need for uniform rules of decision is especially acute under the antitrust laws, because of a plaintiff's virtually unlimited freedom to choose its forum. *See* Section 12 of the Clayton Act, 15 U.S.C. § 22. This Court

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[4] Plainly, the fact that Mitsui's American subsidiary was the nominal purchaser of logs from Telaga Mas is not enough to establish jurisdiction. In *National Bank of Canada*, there was an "American actor clearly involved in this action," 666 F.2d at 9, but that properly was deemed irrelevant to the jurisdictional analysis.

should grant review of this case to resolve the conflict between the Second and Fifth Circuits and thereby ensure that the extraterritorial application of the Sherman Act to international commercial disputes will be governed by a uniform rule, no matter where a plaintiff chooses to sue.

2. In *Brunswick*, this Court described the nature of the injury that must be shown in order to justify recovery of treble damages under section 4 of the Clayton Act:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489 (emphasis in original). The Sixth Circuit correctly has "interpret[ed] *Brunswick* to mean that the pleading of 'antitrust injury' is an essential component of standing under § 4 of the Clayton Act." *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d at 1234. The Ninth Circuit also has recognized that to have standing to sue for treble damages under section 4 of the Clayton Act, a plaintiff must show "that he has suffered an '. . . antitrust injury . . . of the type the antitrust laws were intended to prevent. . . .'" *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d at 500, quoting from *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489.[5]

If the court below had properly applied this rule of standing, it would have been compelled to affirm the

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[5] On June 25, 1982, the Seventh Circuit also endorsed this view in *Bichan* v. *Chemetron Corporation*, [July-Dec.] Antitrust and Trade Reg. Rep. (BNA) No. 1071 at 32.

district court's order dismissing the case. The gravamen of Industrial Investment's complaint, as laid out in specific, detailed allegations, is that it has been displaced by Mitsui as the sole purchaser of logs from Telaga Mas.[6] Thus, the complaint itself alleges merely an injury that is *not* of a "type the antitrust laws were intended to prevent." The mere substitution of one buyer for another is not anticompetitive. In the competition between Mitsui and Forest Products for exclusive access to the logging concession operated by Telaga Mas, only one rival could win. Of necessity, the other rival would suffer a commercial defeat. But the commercial defeat that a potential buyer suffers when it loses access to a particular supplier is merely an injury *from* competition.[7] As such, it is not injury "of the type the antitrust laws were intended to forestall." *Blue Shield of Virginia* v. *McCready*, 50 U.S.L.W. at 4728 n.21. It therefore does not confer standing to sue under section 4 of the Clayton Act.

The Fifth Circuit, however, refused to make this inquiry into standing. Instead, the court expressly disagreed

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[6] Industrial Investment alleges, but without any corroborative allegations of specific facts, that as a result of the displacement Mitsui "monopolized the relevant market." App. A, *infra*, p. 21a n.16. Mitsui, however, resells its logs in Japan, *id.* at 8a, and Industrial Investment has made no colorable allegation that Mitsui has foreclosed competition in the Japanese lumber market as a consequence of its access to the Indonesian logging concession operated by Telaga Mas.

[7] The gist of Industrial Investment's complaint appears to be that although the injury was from competition, the competition was unfair. But the "substitution of one competitor for another by means of unfair competition is not in itself a violation of the antitrust laws." App. A, *infra*, p. 20a n.16. *See, e.g., Havoco of America, Ltd.* v. *Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980); *Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

with the reading that the Sixth and Ninth Circuits had given to *Brunswick*, stating that "*Brunswick* is not a standing case," Pet. App. A, *infra*, p. 17a, and that "[i]t is analytically unsound, we think, to consider the requirement of antitrust injury an additional component of the standing inquiry," *id.* at 18a. The court was wrong on both counts.

This Court's decision in *Brunswick* establishes a requirement in the nature of standing. In *Brunswick*, the case had gone to trial and damages had been awarded. But the sole question before this Court on certiorari was whether, assuming for purposes of analysis that an antitrust violation had been committed, the nature of the plaintiff's injury entitled it to recover. The Court held that because the plaintiff had failed to allege and prove an injury of the type that the antitrust laws were intended to prevent, the defendant was entitled to judgment notwithstanding the verdict. This decision necessarily implicates a rule of standing:

> Although the Supreme Court did not explicitly describe the issue in *Brunswick* as one of standing, that decision clearly establishes that a plaintiff must plead an injury of the type § 4 was intended to remedy before his case will be heard. . . . If the failure to prove cognizable damages requires a judgment for the defendant notwithstanding the verdict, . . . it follows that a failure to allege cognizable damages compels the dismissal of the complaint.

Chrysler Corp. v. *Fedders Corp.*, 643 F.2d at 1234. This Court plainly subscribed to this view in *Blue Shield of Virginia*, where the legal sufficiency of the allegation of injury was treated as a question of standing. *See* 50 U.S.L.W. at 4725-26, 4727 n.19.

The requirement that a plaintiff must allege a legally sufficient injury in order to have standing to sue is

analytically sound. There is no reason to permit a plaintiff to go to trial if his theory of injury is insufficient to support a verdict. The Fifth Circuit's refusal to recognize "antitrust injury" as an essential component of standing simply leads to unnecessary trials and the needless prolongation of expensive, complex litigation. This Court should grant review in order to correct the Fifth Circuit's departure from *Brunswick*.[8]

[8] In the alternative, in view of the intervening decision in *Blue Shield of Virginia*, the Court could summarily reverse, vacate, and remand for the inquiry into standing that the court of appeals erroneously failed to undertake.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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